92-345

No. _____

Supreme Court, U.S.
FILED
AUG 4 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CAROLCO TELEVISION INC.,

Petitioner,

-v.-

NATIONAL BROADCASTING COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Assuming a reorganization plan containing a provision which violates the Bankruptcy Code has been confirmed by a final bankruptcy court order, do res judicata principles bar a party to the bankruptcy case from collaterally attacking the objectionable provision?

2. Did the court below err in departing from other circuits by voiding in a collateral proceeding a provision of a reorganization plan which had been confirmed by a final bankruptcy court order?

PARTIES TO THE PROCEEDINGS

IN THE COURT BELOW

Petitioner Carolco Television Inc. ("Carolco") is the successor-in-interest of De Laurentiis Entertainment Group Inc. (the debtor in the underlying chapter 11 bankruptcy case, "DEG"), the defendant in the bankruptcy court adversary proceeding, in which Carolco intervened. Petitioner was the appellant in the district court and the court of appeals. Attached hereto as Appendix C is a list of subsidiaries of New Carolco Investments B.V., which list includes all of Carolco's affiliates.

Respondent National Broadcasting Company, Inc. ("NBC") was the plaintiff in the bankruptcy court adversary proceeding and the appellee in the district court and the court of appeals.

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NATIONAL BROADCASTING COMPANY, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Carolco Television Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the

Ninth Circuit entered in this case on May 7, 1992.

OPINIONS BELOW

The opinion of the court of appeals, attached hereto as Appendix A, is reported as Carolco Television Inc. v. National Broadcasting Co., (In re De Laurentiis Entertainment Group Inc.), 963 F.2d 1269 (9th Cir. 1992). The opinion of the district court, attached hereto as Appendix B, is unpublished but is available as Carolco Television Inc. v. National Broadcasting Co., (In re De Laurentiis Entertainment Group Inc.), No. LA 88-17251-AA, 1991 WL 340567 (C.D. Cal. March 5, 1991).

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment in this case on May 7, 1992, affirming the opinion

entered by the United States District Court for the Central District of California on March 5, 1991, affirming the summary judgment in favor of NBC entered by the United States Bankruptcy Court for the Central District of California. The jurisdiction of the court of appeals was based upon 28 U.S.C. § 158(d). This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No constitutional provisions are involved.

The relevant portion of section 553 of chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"), provides:

> (a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case. . . .

11 U.S.C. § 553(a).

The relevant portion of section 1141 of the Bankruptcy Code provides:

> (a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such

creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan --

> (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section

> 502(g), 502(h), or 502(i) of this title, whether or not --
>
> (i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;
>
> (ii) such claim is allowed under section 502 of this title; or
>
> (iii) the holder of such claim has accepted the plan; and
>
> (B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

11 U.S.C. § 1141(a), (b), (c), (d)(1).

STATEMENT

This suit deals with the effect of the order (the "Confirmation Order") of the United States Bankruptcy Court for

the Central District of California confirming DEG's reorganization plan (the "Plan") under chapter 11 of the Bankruptcy Code. The basic facts, which are not in dispute, are as follows.

Over a year before confirmation of the Plan, NBC filed a proof of claim asserting a general unsecured claim against DEG's bankruptcy estate in the approximate amount of $1.6 million, for advertising time which NBC had allegedly furnished for DEG's benefit. NBC asserted a right of setoff in the amount of up to $2 million, the maximum amount for which it could have become liable to DEG pursuant to an agreement (the "Manhunter Agreement") with DEG permitting NBC to broadcast the motion picture "Manhunter".

Eight months later, NBC filed its First Amended Complaint. In the Seventh Claim for Relief, NBC asserted that DEG, BBDO Worldwide, or both, owed NBC the sum of $1,598,965.68 for unpaid advertising time. At a status conference in January of 1990 (several months before the Plan and disclosure statement were filed and served on creditors) the bankruptcy court set a pretrial conference for July 17, 1990, which was subsequently continued to September 10, 1990.

In the meantime, DEG proposed the Plan. NBC does not dispute that it received adequate and proper notice of the terms of the Plan, the hearing regarding confirmation of the Plan, and the entry of the Confirmation Order. NBC did not object to the confirmation of the

Plan, nor did it appeal from the Confirmation Order.

The Plan was designed to consummate Carolco's acquisition of certain assets from DEG's bankruptcy estate and to distribute the proceeds of the sale to DEG's creditors. The acquisition was completed pursuant to the Amended and Restated Acquisition Agreement dated December 22, 1989 (the "Acquisition Agreement"). The Acquisition Agreement was an exhibit to the Plan, and its terms and conditions were incorporated by reference in the Plan and expressly approved in paragraph 3 of the Confirmation Order.

The Acquisition Agreement provided for the merger of DAC (a subsidiary of Carolco Pictures Inc.) into DEG, with Reorganized DEG as the surviving

corporation in the merger. The consideration for the merger was paid to DEG's bankruptcy estate for distribution to creditors. The Plan became effective upon consummation of the merger, at which time the purchased assets became vested in Reorganized DEG. Reorganized DEG then changed its name to Carolco Television Inc. and is the Petitioner herein.

In Schedule 5.7(a), the Acquisition Agreement listed those obligations which Carolco assumed; Carolco assumed no other liabilities. Section 8.3.4 of the Plan vested the purchased assets (including accounts receivable due from parties such as NBC) in Carolco free and clear of all liens, claims or encumbrances not otherwise provided for in the Plan or in the Confirmation Order. The Confirmation Order drew creditors' special attention

to the approval of these provisions by referring to them specifically.

The Plan was confirmed in May of 1990. In July of 1990, Carolco intervened in the adversary proceeding as the assignee of the Manhunter Agreement. Carolco then moved for summary judgment that NBC is not entitled to offset its purported advertising claim against amounts due Carolco under the Manhunter Agreement, because NBC is bound by the terms of the confirmed Plan and waived its claimed setoff right by not objecting to the Plan. On October 4, 1990, the bankruptcy court entered its order denying Carolco's motion for summary judgment. On March 7, 1991, the district court affirmed the bankruptcy court's order. On May 7, 1992, the court of

appeals affirmed the district court opinion.

In the court of appeals, Carolco argued that section 1141's mandate that a confirmed plan (1) binds creditors, (2) vests property of the estate in the debtor, (3) renders property dealt with by the plan free and clear of claims, and (4) discharges the debtor, supersedes section 553's statement that ". . . this title [11] does not affect any right of a creditor to offset a mutual debt. . . ." Because section 1141 is contained in title 11, Bankruptcy Code sections 1141 and 553 are in direct conflict in a case where the plan affects setoff rights.

However, Carolco also argued that the finality of the confirmed Plan did not rest solely upon the provisions of section 1141, because the Plan itself

contained express provisions transferring assets to Carolco free and clear of claims such as NBC's. Therefore, because res judicata principles exist and should be applied independently of section 1141, NBC should be barred from collaterally attacking the Plan provisions which were specifically and expressly approved in the final Confirmation Order.

The Ninth Circuit discussed at length the direct conflict between sections 553 and 1141 of the Bankruptcy Code in this case. However, the court disposed of Carolco's res judicata argument in a footnote:

> CTI's res judicata argument largely misses the point. NBC concedes that it is bound by the plan of reorganization. It claims, however, that the plan does not affect its right of setoff because that right is protected by section 553 and

> cannot be taken away by a reorganization plan. To resolve this issue, we must decide whether section 553 takes precedence over the Chapter 11 discharge provided for in section 1141. Thus, CTI's "res judicata" argument can prevail only if their statutory argument prevails, and we need not treat them separately.

Appendix A, p. 5296, n.10. By holding that NBC could assert a right of setoff because section 553 overrides section 1141, the court essentially deleted from the Plan the provisions vesting NBC's debt in Carolco, and DEG's liability in the bankruptcy estate, provisions which had been confirmed by a final bankruptcy court order.

The essence of the Ninth Circuit's decision is that section 1141 is the sole source of the res judicata doctrine in the context of a confirmation order.

This Court should review this rejection of the viability of res judicata independent of any provision of the Bankruptcy Code.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it is contrary to principles established by this Court and is in conflict with the Fourth and Fifth Circuits.

I. THE NINTH CIRCUIT'S DECISION THAT RES JUDICATA DOES NOT APPLY TO A FINAL CONFIRMATION ORDER APPROVING A PLAN WHICH ELIMINATES A SETOFF RIGHT IS CONTRARY TO PRINCIPLES APPLIED BY THIS COURT.

In Katchen v. Landy, 382 U.S. 323, 334 (1966), this Court held that the normal rules of res judicata and collateral estoppel apply to the

decisions of bankruptcy courts. This Court cited Stoll v. Gottlieb, 305 U.S. 165 (1938).

In Stoll, a bankruptcy court had previously confirmed a debtor's reorganization plan that provided for the discharge of a third-party guaranty of gold bonds. Gottlieb, one of the bondholders, did not appear at the hearing on the plan, which was confirmed over the objections of creditors of Gottlieb's class. The confirmation of the plan was not appealed, and Gottlieb later sued to enforce the guaranty. The Supreme Court of Illinois ultimately rejected the guarantor's defense of res judicata.

On petition for writ of certiorari, this Court assumed, without deciding, that the bankruptcy court lacked

jurisdiction of the subject matter (the guaranty) and addressed the finality of the bankruptcy court order confirming the plan. The Court held that a court by necessity has the authority to determine its own jurisdiction over the parties and subject matter, and does so either tacitly or expressly, by rendering a judgment. To allow a party to collaterally attack a court's jurisdiction is to allow retrial of issues already decided.

Neither Katchen nor Stoll suggest that the applicability of res judicata to confirmation orders is based upon or circumscribed by any bankruptcy statute. The Ninth Circuit decision is contrary to these cases and should be reviewed.

II. THE NINTH CIRCUIT DECISION IS IN DIRECT CONFLICT WITH FOURTH AND FIFTH CIRCUIT DECISIONS UPHOLDING THE FINALITY OF CONFIRMATION ORDERS APPROVING PLANS WHICH VIOLATE STATUTES.

The res judicata effect of a confirmation order has been addressed by the Fifth Circuit in connection with section 524 of the Bankruptcy Code. Like section 553, section 524(e) is unequivocal:

> Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

In Republic Supply Co. v. Shoaf, 815 F.2d 1046 (5th Cir. 1987), the plan nevertheless provided for a discharge of

a third-party guarantor's liability. At what was apparently the disclosure statement hearing, Republic (whose debt was guaranteed) objected to the discharge provision, but when the bankruptcy court considered the plan again prior to final confirmation, neither Republic nor any other creditor objected to any part of it. The bankruptcy court then confirmed the plan, including the release of any guarantees.

Republic attempted to sue its guarantor post-confirmation, asserting that the guarantor's discharge was void because it violated section 524(e), and that a proper interpretation of the plan would simply delete the provision. The court disagreed:

> Neither can we agree with Republic's argument that we may disregard the release

provision on the grounds that it was arguably in excess of the bankruptcy court's grant of authority. Although section 524 has generally been interpreted to preclude the release of guarantors by a bankruptcy court, the statute does not by its specific words preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of a plan of reorganization. Regardless of whether that provision is inconsistent with the bankruptcy laws or within the authority of the bankruptcy court, it is nonetheless included in the Plan, which was confirmed by the bankruptcy court without objection and was not appealed. Republic, in effect, is now seeking to appeal the confirmed Plan and asking us to review it on its merits. Questions of the propriety or legality of the bankruptcy court confirmation order are indeed properly addressable on direct appeal. Republic, however, is now foreclosed from that avenue of review because it chose not to pursue it. The issue before us in this appeal is the

> application, not the interpretation, of the Plan.

Republic Supply, 815 F.2d at 1050. The court found that all of the elements of res judicata were satisfied and that Republic was bound by the confirmed plan. The court also noted that neither the interests of creditors in being able to rely on a guaranty nor the interest of any single creditor is sufficient to outweigh the application of res judicata. Id. at 1054, n.9. The court relied heavily upon the Shoaf case, which (as discussed above) considered a similar issue. Thus, according to the Fifth Circuit, a confirmed plan eliminating a claim binds a creditor which fails to object to and appeal from confirmation, despite the fact that the Bankruptcy Code on its face preserves the claim.

The Fourth Circuit has also considered the finality of confirmation orders despite the confirmed plan's asserted violation of a federal statute. In Department of the Air Force v. Carolina Parachute Corp., 907 F.2d 1469 (4th Cir. 1990), the federal government had entered into executory contracts with the debtor. The debtor's reorganization plan expressly provided for assumption of the government's contracts. On the last day to object to the plan, the government filed a motion for modification of the automatic stay to allow it to terminate the debtor's contracts, alleging, among other things, that the contracts were subject to the Anti-Assignment Act (41 U.S.C. § 15) and therefore could not be assumed pursuant to section 365(c)(1) of the Bankruptcy Code.

The hearing on the government's motion was scheduled for more than a month after the confirmation hearing. Despite having been notified of the confirmation hearing and the plan's proposed assumption of the contracts, the government did not object to the plan. At the confirmation hearing, the bankruptcy court permitted the debtor to assume the contracts without addressing the government's contention that the contracts were not assumable under federal law, and entered an order confirming the debtor's plan. The government did not appeal the confirmation order.

The bankruptcy court later denied the government's motion for relief from the automatic stay, because the government's failure to appeal the order

confirming the plan which assumed the contracts precluded it from relitigating the assumability of the contracts. The district court reversed, and its decision was in turn reversed in part by the Fourth Circuit.

In ruling that the government was bound by the debtor's confirmed plan, the court stated:

> We need not decide whether the Anti-Assignment Act prevents Carolina Parachute from assuming these government contracts because . . . the government failed to object to the plan or to appeal the confirmation order, both of which expressly provided for assumption of these contracts by Carolina Parachute, and under res judicata principles it is now barred from asserting this position.
>
> The government argues, however, that it did object and appeal the confirmation order, contending that its

> motion to modify the automatic stay constituted an objection to the confirmation plan [sic] . . . . We are not persuaded by such reasoning. Regardless of whether the government's motion can be construed as an objection made in accordance with Bankruptcy Rule 3020(b), its failure to appeal the confirmation order is fatal to this argument. . . . We reject the government's de facto appeal argument as nothing more than an attempt to circumvent the procedures established in Bankruptcy Rule 8001 or the time limits established in 8002.

Carolina Parachute, 907 F.2d at 1473. According to the reasoning of Carolina Parachute, the mere pendency of a proceeding to determine a right affected by a proposed plan is insufficient to preserve that right in the face of confirmation of the plan. Like the government in Carolina Parachute, NBC knew that the Plan provided that Carolco

would receive the right to amounts due under the Manhunter Agreement and that Carolco would be expressly excused from any liability for claims against DEG such as NBC's.

The decision below is in direct conflict with Republic Supply and Carolina Parachute and should be reviewed.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

August 1992

Respectfully submitted,

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APPENDIX A

CAROLCO TELEVISION INC.

v.

NATIONAL BROADCASTING CO.

Appeal from the United States District Court for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
April 6, 1992 -- Pasadena, California

Filed May 7, 1992

Before: Harry Pregerson, Dorothy W. Nelson, and David R. Thompson, Circuit Judges.

Opinion by Judge D.W. Nelson

SUMMARY

Bankruptcy/Dischargeability of Debts

Affirming district court grants of summary judgment, the court of appeals

held that under the doctrine of quantum meruit a creditor was entitled to setoff against the debtor an amount owed by the creditor in spite of the debtor's claim at the debt had been discharged under an approved reorganization plan.

De Laurentiis Entertainment Group contracted for the purchase of advertising from National Broadcasting Co. through an intermediary. When Entertainment filed for Chapter 11 bankruptcy, the debt was still owing. Entertainment was reorganized into appellant Carolco Television, Inc. When Carolco sued NBC on a pre-bankruptcy debt, NBC asserted the advertising debt as a setoff against Carolco's claim. The bankruptcy court granted summary judgment for NBC, concluding that it was entitled to recover the debt on a quantum meruit

theory, in spite of Carolco's allegation that the debt had been discharged under the bankruptcy laws when a reorganization plan was adopted. NBC was also permitted to set off this debt against Carolco. The district court affirmed.

[1] Carolco argued that quantum meruit would be improper because NBC did not expect to be paid by De Laurentiis but rather by the advertising agency. The court acknowledged that California law was unclear on this. [2] However, the court noted that the vast majority of California cases do not require that a plaintiff expect compensation from a defendant himself to prove a quantum meruit claim. Compensation can be expected only in the sense that the services rendered must not have been intended as gratuitous. The expectation

of payment by a defendant is not required. [3] Such a requirement would be inconsistent with the basic concept of quantum meruit recovery, which is distinct from an implied-in-fact contract. [4] In this case, the court thought it would be both unjust and contrary to the principles of quantum meruit law to deny NBC its right to recover on the grounds that it had no contract with Carolco. Therefore, summary judgment on this claim was proper.

[5] The court had to decide whether Section 1141 or 553 of the Bankruptcy Code applied in this case. [6] The court noted that the majority view provided strong support for the primacy of §553. In reaching this conclusion, the court relied not only on persuasive authority,

but also on the language and structure of §553 and the policies that underlie it. [7] While that section does not by itself create a right of setoff, it allows setoffs in bankruptcy to the same extent they are allowed under state law. [8] Setoffs in bankruptcy have been generally favored, and a presumption in favor of their enforcement exists. [9] In addition, the primacy of setoffs is essential to the equitable treatment of creditors. [10] Barring the setoff in this case would result in unfairness.

COUNSEL

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OPINION

D.W. NELSON, Circuit Judge:

OVERVIEW

De Laurentiis Entertainment Group ("DEG") contracted through an intermediary to purchase advertising from National Broadcasting Co. ("NBC"). DEG filed for bankruptcy under Chapter 11 without having paid for this advertising. DEG was reorganized through a series of steps into Carolco Television, Inc. ("CTI"), which emerged from bankruptcy. When CTI sued NBC on a pre-bankruptcy debt, NBC asserted the advertising debt as a setoff against CTI's claim. The bankruptcy court granted summary judgment

for NBC, concluding that it was entitled to recover the advertising debt from DEG on a quantum meruit theory. It also permitted NBC to set off this debt against CTI. The district court affirmed. We affirm as well.

FACTUAL AND PROCEDURAL BACKGROUND

DEG made movies. It contracted with an advertising agency ("BBDO") to place advertising for various movies in different media markets. BBDO purchased $1.6 million in television advertising from NBC on DEG's behalf. DEG knew and approved of this purchase, but was not directly a party to the purchase contract. NBC billed BBDO, which in turn billed DEG for all its advertising accounts on a separate invoice. Neither DEG nor BBDO had paid the $1.6 million

owed to NBC at the time DEG filed for bankruptcy.

DEG had other dealings with NBC as well. DEG granted to NBC the right to televise one of its movies, called "Manhunter," at a price of $1.25 million. When DEG filed for bankruptcy protection, NBC still owed this money to DEG.

In August 1988, DEG filed for bankruptcy protection under Chapter 11. In March 1989, NBC filed a "proof of claim" asserting its $1.6 million interest and claiming a right of setoff against its $1.25 million debt to DEG. NBC also filed a motion for relief from the automatic stay[1/] so that it could pursue its setoff claim. NBC's claim was

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[1/] The filing of a bankruptcy petition automatically stays any and all proceedings against the debtor. 11 U.S.C. §362.

converted into an adversary proceeding by the bankruptcy court. NBC filed a complaint, and the parties proceeded with discovery. NBC has pursued its claim diligently before the bankruptcy court at all times.

Meanwhile, DEG filed a reorganization plan which was confirmed by the bankruptcy court in May 1990. Under this plan, the lion's share of DEG's assets were purchased by Carolco, merged with a Carolco subsidiary, and renamed CTI. Under the plan, CTI acquired the rights to the $1.25 million claim against NBC. According to the plan, this right was transferred "free and clear" of all pre-bankruptcy claims or interests not listed in the plan. NBC's $1.6 million claim was not listed in the plan. NBC did not object to this

plan or contest the order confirming the plan.

In July 1990, CTI intervened in the NBC-DEG proceeding and asserted its right to the $1.25 million. NBC in turn asserted its right to a setoff of the entire $1.25 million from the $1.6 million it was owed.[2/] Both parties filed motions for summary judgment. The bankruptcy court concluded that disputed issues of fact concerning whether DEG was a party to the BBDO-NBC contract precluded summary judgment on NBC's contract claims. However, it granted NBC summary Judgment on its quantum meruit

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[2/] NBC did not seek to recover any money from CTI. NBC concedes that it must seek $350,000 -- the difference between the $1.6 million it is owed and the $1.25 million it owes -- from DEG's bankruptcy estate as an unsecured creditor.

claim against DEG. Finally, the bankruptcy court concluded that NBC was entitled to assert its quantum meruit claim as a setoff against CTI, in spite of CTI's claim that this debt was discharged under the bankruptcy laws when the plan was confirmed. CTI appealed to the district court, which affirmed.

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, 110 S. Ct. 3217 (1990). We must determine whether, viewing the evidence in the light most favorable to CTI, there are any genuine issues of material fact and whether the district court correctly applied the law. Tzung v. State Farm Fire & Gas. Co., 873 F.2d 1338, 1339-40 (9th Cir. 1989).

DISCUSSION

I. Quantum Meruit

The district court denied NBC's motion for summary judgment on its contract theories, concluding that issues of material fact existed as to whether BBDO had acted as DEG's agent in buying advertising from NBC. However, it granted summary judgment for NBC on its quantum meruit claim.[3/] CTI appeals the grant of summary judgment on the quantum meruit claim (case no. 91-55471).

Quantum meruit (or quasi-contract) is an equitable remedy implied by the law under which a plaintiff who has rendered services benefiting the defendant may

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3/ As long as NBC seeks only one recovery, it is entitled to pursue both contract claims and quantum meruit claims arising out of the same transaction. See, e.g., Haggerty v. Warner, 252 P.2d 373, 377 (Cal. Ct. App. 1953).

recover the reasonable value of those services when necessary to prevent unjust enrichment of the defendant. **B. Witkin**, Summary of California Law: Contracts §91 (1987); 55 **Cal. Jur. 3d Restitution** 360-61 (1980). Quantum meruit is not the same as a contract implied in fact. Quantum meruit is based not on the intention of the parties, but rather on the provision and receipt of benefits and the injustice that would result to the party providing those benefits absent compensation. **B. Witkin**, supra, at §12.

NBC sought to recover in quantum meruit the reasonable value of the advertising it had provided for DEG's benefit and for which it had not been paid. The bankruptcy court found that, based on the undisputed factual evidence, NBC had established its claim to

recovery. The district court affirmed on the basis of the bankruptcy court's finding that "DEG benefited from the Network Time rendered to it by NBC at DEG's special instance and request." (emphasis added).[4/] While CTI disputes

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[4/] The district court erroneously concluded that this factual finding was subject to the "clearly erroneous" standard of review. Since this case arises on summary judgment to be standard of review is de novo. See Kruso, 872 F.2d at 1421. However, the district court went on to note that its result would be the same under any standard of review.

The bankruptcy court also cited Earhart v. Wm. Low Co., 600 P.2d 1344 (Cal. 1979), for the proposition that "[r]ecovery may be had on a quantum meruit claim even if the party against whom relief is sought was not the party who requested the labor, materials or service, the value of which is sought to be recovered." Earhart does not support such a conclusion. That case held only that a defendant who requested services from the plaintiff could be liable in quantum meruit even though it did not actually benefit from the services it

(continued...)

whether DEG was ever contractually obligated to NBC directly, it does not dispute that it in fact requested that BBDO purchase advertising time for its benefit from NBC. Nor does CTI dispute that DEG received a benefit from NBC for which it has not paid anyone.[5/]

[1] CTI contends, however, that quantum meruit recovery by NBC would be improper because NBC did not expect to be paid by DEG, but rather by BBDO. NBC contends that an expectation of payment

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[4/](...continued)
requested. Id. at 1351-52. The district court properly recognized this problem and affirmed on a different ground.

[5/] For this reason, CTI's citation to cases establishing that entitlement to quantum meruit recovery is a question or fact is unavailing. Summary judgment on issues of fact is appropriate where there is no material dispute over the facts. Here, the only dispute is over the legal requirements for quantum meruit recovery.

by the benefitted party is not an element of quantum meruit recovery. California law on this subject is not entirely clear.

Two cases relied upon by CTI do suggest such a requirement. In Fontaine v. Home Box Of Office, 654 F. Supp. 298, 303 (C.D. Cal. 1986), the court asserted in dictum that an element of quantum meruit recovery was that the circumstances "would reasonably inform the person sought to be charged that plaintiff, in performing such services, was expecting to be paid by a person sought to be charged." (emphasis added). A more closely analogous case is Shepherd v. Perea, 220 P.2d. 776, 777 (Cal. Ct. App. 1950). In Shepard, the plaintiff fixed the defendant's tractor at the request of a third party, who had

originally sold the defendant the tractor. The plaintiff sought recovery from the defendant, rather than from the third party with whom he had contracted. The court held that "[u]nder the facts of this case, the rule of unjust enrichment does not apply. Ordinarily, of course, the law will imply a promise on the part of the recipient of services to pay for them. But the implied promise is a question of fact, and a determination by the trier of fact that there was no such promise will be supported on appeal."[6/]

[6/] Two other California cases seem to suggest that quantum meruit does not apply to subcontractors who are not in privity with property owners. See Truestone v. Simi West Indus. Park II, 209 Cal. Rptr. 757, 763 (Ct. App. 1984); Rogers v. Whitson, 39 Cal. Rptr. 849, 853, 856-57 (Ct. App. 1964). However, in both cases, the property owner had already paid the general contractor, who had failed to pay the subcontractor. The

(continued...)

[2] However, the vast majority of California cases do not require that a plaintiff expect compensation from the defendant himself in order to prove a quantum meruit claim. Compensation must be "expected" only in the sense that the services rendered must not have been intended to be gratuitous. See e.g., Haggerty v. Warner, 252 P.2d 373, 377 (Cal. 1953) (no requirement of intent to compensate); Carey v. Cusack, 54 Cal. Rptr. 244, 252 (Ct. App. 1966) (same); Wescoatt v. Meeker, 63 Cal. App. 2d 618, 626 (1944) (presumption of recovery sustained if "it can reasonably be

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[6/](...continued)
property owner was not unjustly enriched, therefore, as he had paid for the work that was done. Both Truestone and Rogers rejected the quantum meruit claims for this reason, and not because of a lack of privity.

inferred that pecuniary compensation was in the view of the parties," but not if "the services were intended to be gratuitous."). Nor do the treatises suggest that an expectation of payment by the defendant himself is required. See **B. Witkin**, supra, at §113 (expectation of compensation requirement limited to determining whether services were intended to be gratuitous); 55 **Cal. Jur. 3d**, supra at §49. Kossian v. American Nat'l Ins. Co., 62 Cal. Rptr. 225, 227 (Ct. App. 1967) provides substantial support for this view. There, the owner of a building damaged by fire contracted with the plaintiff to repair the building. The plaintiff did so. The plaintiff then sought recovery in quantum meruit from the defendant, who had not contracted with the plaintiff but who

held a deed of trust on the building and who had received the proceeds of the fire insurance. The court held that the plaintiff was entitled to recover from the defendant on a quantum meruit theory, even though he had no express or implied contractual relationship with the defendant and did not expect payment from the defendant, but rather from the owner.

[3] We do not believe California law requires an expectation of payment by the defendant. Such a requirement would be inconsistent with the basic concept of quantum meruit recovery, which is distinct from an "implied-in-fact" contract. As Professor Witkin has stated, "[q]uasi-contracts have often been called implied contracts or contracts implied in law; but unlike true contracts, quasi-contracts are not based

on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice." **B. Witkin**, supra, at §12. To require a plaintiff seeking quantum meruit recovery to prove that the parties intended that the defendant compensate her directly for her services would conflate quantum meruit with implied-in-fact contracts by requiring the plaintiff to prove an implicit agreement to pay for services. The whole point of quantum meruit recovery is to compensate plaintiffs who have provided a benefit to defendants but who do not have

a contract -- express or implied -- with those defendants.[7/]

[4] In this case, NBC contracted with BBDO, but it was DEG who requested the advertising and who benefited from it. DEG (and CTI) have retained this benefit, but have not paid either NBC or BBDO. BBDO has agreed to relinquish its claim against CTI if NBC recovers against them, so there is no chance that CTI will be forced to pay twice. In these circumstances, we believe it would be both unjust and contrary to the principles of quantum meruit law to deny

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7/ The Shepherd case cited above appears to conflate quantum meruit with contracts implied in fact. While the court there claimed to be talking about "the rule of unjust enrichment" -- i.e. quantum meruit -- it upheld a trial court's finding that no promise to pay was in fact implied by the parties.

NBC its right to recover on the grounds that NBC had no contract with DEG.

The bankruptcy and district courts correctly granted summary judgment in favor of NBC on its quantum meruit claim.

II. NBC's Right to a Setoff

Having determined that NBC had a right to $1.6 million from DEG, the bankruptcy court addressed itself to the question whether NBC could assert that right as a setoff against CTI. The bankruptcy court allowed the setoff, and the district court affirmed. CTI contends that NBC lost its right to a setoff when DEG's final Chapter 11 reorganization plan was confirmed (case no. 91-55473).

The general purpose of a Chapter 11 bankruptcy is to discharge debtors from their debts so that they can continue in

business, while paying creditors equitably from what funds are available. 11 U.S.C. §1141 provides for the discharge of pre-petition debts after a debtor goes through bankruptcy. It also provides that any assets retained by the debtor under the plan of reorganization are free and clear of any pre-petition debts.[8/] An equally venerable part of

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[8/] 11 U.S.C. §1141 provides that:

> (a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind . . . any creditor . . . whether or not such creditor has accepted the plan.
>
> (c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the

(continued...)

the bankruptcy laws allows a creditor to "set off" a claim that the debtor owes it against a claim that it owes the debtor, as long as both debts arose before the bankruptcy. Thus, if the debtor and the creditor each owed the other $20, they could set those debts off against each other, rather than attempting to collect from each other. 11 U.S.C. §553 protects the right to a setoff from the operation

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[9]/(...continued)

> plan is free and clear of all claims and interests of creditors . . .
>
> (d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan --
>
> (A) discharges the debtor from debt that arose before the date of such confirmation . . .

(emphasis added).

of the remainder of the bankruptcy code.[9/]

[5] These two sections are in direct conflict in this case. See generally In re Rooster, Inc., 127 B.R. 560, 568 (Bkrtcy. E.D. Pa. 1991) (noting but not resolving this statutory conflict). The parties concede that none of the "exceptions" contained in either

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9/ 11 U.S.C. §553 provides that:

> (a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case . . .

(emphasis added).

section 1141 or section 553 apply in this case. CTI contends that sections 1141(c) and (d) operate to discharge its $1.6 million debt to NBC, and that in any event res judicata precludes NBC from asserting that debt because it did not object to the reorganization plan before it was confirmed.[10/] On the other hand, NBC contends that under section 553, the plan did not affect its right to assert a setoff in response to CTI's

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[10/] CTI's res judicata argument largely misses the point. NBC concedes that it is bound by the plan of reorganization. It claims, however, that the plan does not affect its right of setoff because that right is protected by section 553 and cannot be taken away by a reorganization plan. To resolve this issue, we must decide whether section 553 takes precedence over the Chapter 11 discharge provided for in section 1141. Thus, CTI's "res judicata" argument can prevail only if their statutory argument prevails, and we need not treat them separately.

pre-bankruptcy claim against it. We must decide which of the two code sections controls. This is a question of first impression in this circuit, and other courts considering this and similar questions are closely divided.

Only two courts have considered the precise conflict we face here. In In re Newport Offshore, 86 B.R 325, 326 (Bktcy. D.R.I. 1988), the court concluded in an alternative holding that the setoff in question was discharged. It said: "[Allowing the setoff] is dependent upon the correctness of the assumption that potential §553 setoff rights survive confirmation, notwithstanding the fact that such alleged setoff rights have not been judicially established before confirmation. We conclude that, on the present facts, said assumption is

erroneous." That is the extent of Newport Offshore's discussion of the issue.

The other court to consider the question reached the opposite conclusion. After citing to section 553, it stated: "Thus, even after confirmation, [the creditor] could assert as a setoff to a prepetition liability owed to the Debtor a claim that arose prepetition." In re Service Decorating Co., 105 B.R. 859, 862 (N.D. Ill. 1989) (citations omitted). This statement was dictum, however, since in that case the creditor's claim arose after the bankruptcy petition was filed, not before as section 553 requires.

In addition, there are four lines of analogous cases which may shed some light on this question. The first group of cases considers the conflict between

section 553 and 11 U.S.C. §1327, which governs discharge in Chapter 13 proceedings. The language of section 1327 is virtually identical to that contained in section 1141.[11/] These cases have concluded that section 1327 takes precedence over section 553. See United States ex rel. I.R.S. v. Norton, 717 F.2d 767, 774 (3rd Cir. 1983); In re

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[11/] Section 1327 provides that:

> (a) The provisions of a confirmed plan bind the debtor and each creditor . . . whether or not such creditor has objected to, has accepted, or has rejected the plan.
>
> (c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

Hackney, 20 B.R. 158, 159 (Bankr. D. Idaho 1982); In re Holcomb, 18 B.R. 839, 841 (Bankr. S.D. Ohio 1982) (alternative holding). These cases provide support for CTI's position, because the language of section 1327 closely tracks the language of 1141 and because, like Chapter 11, Chapter 13 provides for a plan of reorganization.[12/] Hackney in particular relied on the creditor's opportunity to raise its claim during the reorganization proceedings in concluding that the creditor was barred from

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12/ We note, however, that in all of these cases the Internal Revenue Service was the creditor. The IRS attempted to retain tax overpayments and set them off against other debts. The factual settings of these cases may have had some influence on their results.

asserting the setoff outside those proceedings. See 20 B.R. at 159.[13/]

[13/] In addition, CTI refers the court to a number of cases which have held in other contexts that a confirmed plan of reorganization is entitled to res judicata effect. See, e.g., Department of the Air Force v. Carolina Parachute Corp., 907 F.2d 1469, 1473-74 (4th Cir. 1990) (section 1141 plan precludes reliance by United States on Anti-Assignment Act); Republic Supply Co. v. Shoaf, 815 F.2d 1046, 1050-54 (5th Cir. 1987) (section 524 discharge is res judicata as to discharge of a third-party guaranty); In re Gregory, 705 F.2d 1118, 1121 (9th Cir. 1983) (section 1327 plan precludes attack on legality of "zero-payment" provision of plan); In re Blanton Smith Corp., 81 B.R. 440, 443 (M.D. Tenn. 1987) (section 1141 plan was res judicata even if based on erroneous interpretation of the law); In re Arctic Ents., 68 B.R. 71, 79-80 (D. Minn. 1986) (section 1141 plan precludes assertion of lien not recognized in plan); In re Henderberg, 108 B.R. 407, 411-14 (Bankr. N.D.N.Y. 1989) (section 1141 plan precludes later contest of the priority status of claims dealt with in the plan).

These cases tend to support CTI's position, since they establish that a plan of reorganization is binding on creditors even if it is legally

(continued...)

A second group of cases considers the conflict between section 553 and section 524(a)(2), a provision similar to section 1141 but which applies in Chapter 7 cases.[14] The majority of these cases

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[13] (...continued)
erroneous. They are not directly relevant to this case, however, because NBC concedes that it is bound by the plan. Its position is that under section 553 the plan does not eliminate its right to a setoff.

[14] 11 U.S.C. §524(a)(2) provides that:

> A discharge in a case under this title --
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recovery or offset any such debt as a personal liability of the debtor
> . . .

(emphasis added). The conflict between section 524 and section 553 is even more direct than the one we face, since section 524 explicitly prohibits its recovery of offsets.

have held that section 553 takes precedence over section 524(a)(2). See In re Davidovich, 901 F.2d 1533, 1538-39 (10th Cir. 1990); In re Buckenmaier, 127 B.R. 233, 236-37 (9th Cir. BAP 1991) (also noting that "[m]ost cases hold that a valid setoff claim cannot be defeated by a discharge in bankruptcy."); Krajci v. Mt. Vernon Consumer Discount Co., 16 B.R. 464, 466 (E.D. Pa. 1981) ("The fact that plaintiffs' debt to defendant was discharged in bankruptcy does not affect defendant's right to a set-off" under section 553); In re Morgan, 77 B.R. 81, 84-85 (Bankr. S.D. Miss. 1987); In re Conti, 50 B.R. 142, 149 (Bankr. E.D. Va. 1985); In re Ford, 35 B.R. 277, 279-80 (Bankr. N.D. Ga. 1983); In re Slaw Constr. Corp., 17 B.R. 744, 747-48 (Bankr. E.D. Pa. 1982). Two courts have

reached the opposite conclusion, however. See In re Dezarn, 96 B.R. 93, 94-95 (Bankr. E.D. Ky. 1988); In re Johnson, 13 B.R. 185, 188-89 (Bankr. M.D. Tenn. 1981).

The majority view provides strong support for the primacy of section 553, since those courts subordinate section 524(a)(2) to that provision even though section 524 expressly applies to setoffs. Section 524 applies in Chapter 7 proceedings, however, where there is no confirmed plan of reorganization. CTI contends that the result should be different where (as in Chapter 11 proceedings) creditors have had a prior opportunity to assert their rights.

A final set of cases involves the interaction between section 68 and section 14(f) of the old Bankruptcy Act,

in effect until 1978. These sections closely track sections 553 and 1141 respectively.[15/] Cases interpreting these sections gave precedence to section 68 (the predecessor to section 553). See Record Club of America v. United Artists Records, 80 B.R. 271, 278 (S.D.N.Y. 1987); see also In re Reading Co., 72 B.R. 293, 294-95 (E.D. Pa. 1987) (allowing setoff in section 77

[15/] Section 68(a) provided:

> In all cases of mutual debts or mutual credits between the estate of a bankruptcy and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

11 U.S.C. §108 (repealed 1978). Section 14(f)(2) prevents creditors from "instituting or continuing any action or employing any process to collect debts." 11 U.S.C. §32(f)(2) (repealed 1978).

reorganization).[16/] Cf. Marley v. United States, 381 F.2d 738, 742 (Ct. Cl. 1967) (provision that, after reorganization, debts were "free and clear of liens" did not bar setoffs). These cases suggest that section 553 ought to take precedence under the Bankruptcy Code, since its predecessor section enjoyed such precedence under the old Act. See Midatlantic Nat'l Bank v. New Jersey, 474 U.S. 494 (1986) (Bankruptcy Code is to be interpreted consistently with old Act

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[16/] Reading is arguably inconsistent with the Supreme Court's decision in Baker v. Gold Seal Liquors, 417 U.S. 467, 474 (1974). The Court there noted the preference given to setoffs under section 68 in general bankruptcy cases, but concluded that setoffs were not allowable in section 77 (railroad reorganization) cases. Baker has no effect on this case, though. As the Court noted in Baker, "a proceeding under §77 is not an ordinary proceeding in bankruptcy." Id. at 470 n.3.

unless Congress demonstrated an intent to change a particular result).

[6] We conclude that section 553 must take precedence over section 1141. In reaching this conclusion, we rely not only on the foregoing persuasive authority, but also on the language and structure of section 553 and the policies which underlie it. Section 553 provides that, with listed exceptions not relevant here, "this title does not affect the right of any creditor to offset a mutual debt . . ." This language not only establishes a right to setoffs in bankruptcy, subject to enumerated exceptions, but seems intended to control notwithstanding any other provision of the Bankruptcy Code. To give section 1141 precedence would be to ignore this language.

[7] Furthermore, a contrary conclusion essentially would nullify section 553. Section 553 does not by itself create a right of setoff. Instead, it merely allows setoffs in bankruptcy to the same extent they are allowed under state law. Buckenmaier, 127 B.R. at 237. If section 1141 were to take precedence over section 553, setoffs would be allowed under Chapter 11 only where they were written into a plan of reorganization. Section 553 would then be largely superfluous, since a setoff could be written into the reorganization plan even without section 553.[17/] A

[17/] CTI suggests that section 553 is intended mainly to establish that a setoff is not a preferential transfer in violation of 11 U.S.C. §547. Were this the sole intent of section 553, it could say exactly that: that setoffs do not constitute preferential transfers. It

(continued...)

reading of section 553 which renders it meaningless should be highly suspect.

[8] Our reading is also consistent with the history of the bankruptcy laws. Setoffs have a long and venerable history, dating back to Roman and English law. Setoffs in bankruptcy are almost as venerable, having been established in England in 1705 and in the United States in 1800. Buckenmaier, 127 B.R. at 237. Since that time, setoffs in bankruptcy have been "generally favored," and a presumption in favor of their enforcement exists. Id. Giving precedence to section 1141 would reverse this

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17/(...continued)
would also more appropriately be included as an exception to section 547, rather than as a separate provision in its own right. In fact, however, section 553's language is far more general. The sweeping language of section 553 belies the limited reading CTI would afford it.

long-standing presumption. Setoffs would only be allowed if sanctioned in a plan of reorganization. If Congress had intended to make such a major change from the common law, one might expect some indication of that intent in the statute itself. None can be found.

[9] Moreover, the primacy of setoffs is essential to the equitable treatment of creditors. A setoff is allowed as a defense to a claim brought by the debtor against a creditor. The creditor can claim only an amount large enough to offset its debt; it cannot collect anything from the debtor. Absent a setoff, a creditor in NBC's position is in the worst of both worlds: it must pay its debt to the debtor in full, but is only entitled to receive a tiny fraction of the money the debtor owes it. It was

to avoid this unfairness to creditors that setoffs were allowed in bankruptcy in the first place.[18]

[10] Finally, we note the unfairness that would result from barring a setoff in the case before us. In this case, NBC asserted its setoff during the pendency of the bankruptcy proceedings,

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[18] It may be countered that setoffs themselves are unfair to creditors. Unsecured creditors generally have to settle for receiving a small percentage of the sum they are owed, sometimes as little as a few cents on the dollar. The creditor who asserts a setoff, by contrast, is paid 100% of its claim (at least up to the value of the setoff). This differential treatment contradicts the general policy of the bankruptcy laws, which is to treat the same class of creditors equally. See In re Elcona Homes Corp., 863 F.2d 483, 484-86 (7th Cir. 1988) (taking this view). Whatever the merits of this argument, it is an argument against allowing setoffs in bankruptcy at all. We cannot give weight to such arguments, because section 553 makes it clear that Congress intended to preserve the right to a setoff.

filing both a petition for relief from stay and a proof of claim. CTI was therefore on notice that NBC intended to assert a setoff against it. Furthermore, NBC diligently pursued its claim before the bankruptcy court during the entire period the reorganization plan was being considered. The bankruptcy court apparently assumed that NBC's claim would survive the order confirming reorganization, since it scheduled discovery and other proceedings even after the reorganization plan was confirmed. If the adversary proceedings regarding NBC's claim had been concluded prior to the order confirming reorganization, NBC would unquestionably be entitled to its setoff. It would be unjust to deny NBC that right here solely because of the timing of the proceedings,

particularly since NBC had no control over their scheduling.

To be sure, the result we reach will place some burden on the policies of discharge and of finality served by section 1141. However, NBC does not seek to collect its debt from CTI. It merely seeks a setoff against CTI's claims against it. The primary purpose of section 1141 -- to prevent post-bankruptcy debt collections -- is therefore not disserved in this case. In light of the strong policies favoring setoffs, we think that section 553 must prevail over section 1141, and therefore that NBC was entitled to assert its setoff against CTI.

CONCLUSION

The judgments of the district court are AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASE NOS. CV 90 6039 JGD; CV 90 6040 JGD

March 7, 1991

CAROLCO TELEVISION, INC.

v.

NATIONAL BROADCASTING COMPANY, INC.

MEMORANDUM OPINION RE
APPEAL FROM BANKRUPTCY COURT

On February 25, 1990, the Court heard argument regarding two appeals of orders of the United States Bankruptcy Court. After consideration of the arguments presented at that hearing, as well as those offered by the parties in

written briefing, the rulings of the Bankruptcy Court are HEREBY AFFIRMED.

Factual Background

On August 16, 1988, De Laurentiis Entertainment Group Inc. ("DEG") voluntarily filed for bankruptcy under Chapter 11. On May 3, 1990, the Bankruptcy Court entered an order confirming DEG's Modified Second Amended Plan of Reorganization (the "Plan"). Under the Plan, Carolco Television Inc. ("CTI") purchased the Debtor's interest in the bankruptcy estate[1/] and partially funded payments to be made to all creditors. Both appeals now before this

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[1/] Technically, the purchase took the following form: DEG Acquisition Corp, a wholly owned subsidiary of Carolco Pictures, Inc., was merged into DEG to form Reorganized DEG. Subsequent to confirmation of the Plan, Reorganized DEG was renamed Carolco Television, Inc. (i.e. CTI).

Court arise from an adversary proceeding brought by National Broadcasting Company, Inc. ("NBC") against DEG, DEG's Creditors Committee, and BBDO Worldwide. CTI, as successor to most of debtor's assets, intervened in the adversary proceeding.[2/]

CV 90-6039 is an appeal from a Bankruptcy Court Order which granted summary judgment in favor of appellee NBC. The Bankruptcy Court ruled that NBC was entitled to quantum meruit recovery against the bankruptcy estate for advertising purchased on behalf of DEG by its advertising agency BBDO Worldwide.

According to the undisputed facts in the pre-trial order for the adversary proceeding (Appendix to Appellant's

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[2/] On July 17, 1990, the bankruptcy court signed an Order substituting CTI in place of DEG and the unsecured creditors committee.

Opening Brief at 350-366), "at the request of DEG and with DEG's prior approval, BBDO, as agent, purchased certain network advertising time from NBC." Appendix, p. 351. The amount owed to NBC for such advertising time was $1,598,966. Appendix, p. 352. The purchase of advertising on the network was memorialized by certain participating sponsorship agreements between BBDO and NBC. DEG never signed any such agreements, nor received a copy of such agreements from BBDO or NBC. Instead, NBC billed BBDO who, in turn, billed DEG by use of separate invoices. BBDO never advised DEG that DEG might be directly liable to NBC.

At the time of the bankruptcy filing in August, 1988, DEG was substantially behind schedule in its

payments to BBDO. Notably, both BBDO and NBC made claims against DEG's bankruptcy estate for payments related to DEG ads that ran on NBC. On November 9, 1989, NBC filed its first amended complaint against the bankruptcy estate.

On August 29, 1990, NBC filed a motion for summary judgment. That motion contended, inter alia, that DEG was liable to NBC on a quantum meruit common count. In an Order entered on October 3, 1990, the Bankruptcy Court granted NBC's motion with respect to the fourth claim for relief based upon quantum meruit.[3/]

[3/] The October 3, 1990 Order also denied NBC's motion for summary judgment as to the second and third claims for relief (i.e. the contract claims) on grounds that genuine issues of material fact existed as to whether BBDO, as DEG's authorized advertising agency, had authority to contractually bind DEG to pay NBC for network advertising time.

(continued...)

On October 11, 1990, CTI filed notice of appeal of the Bankruptcy Court's Order granting NBC's summary judgment motion.

CV 90-6040 is an appeal from a Bankruptcy Court Order which denied appellant CTI's motion for summary judgment. As noted, NBC filed an adversary complaint on November 9, 1989.[4/] In response, CTI made a motion for summary judgment regarding NBC's seventh claim for relief. CTI challenged NBC's claim that it should be allowed to set off amounts it owed to DEG against

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[3/](...continued)
That portion of the Order is not on appeal.

[4/] The adversary proceeding instituted by the November, 1989 amended complaint, was borne out of a March 10, 1989 filing by NBC seeking relief from the automatic stay. The motion for relief from stay was ultimately converted into the adversary proceeding.

amounts DEG owed for advertising time on the network.

NBC's debt to DEG arose from a Feature Motion Picture Network Broadcast Agreement entered on March 13, 1987 between NBC and a predecessor in interest to DEG (Dino De Laurentiis Corporation). The agreement involved the rights to show the film "Manhunter" on NBC television. The agreement called for payment to DEG of $2,000,000 ($1,250,000 for the first airing and $750,000 for an additional airing). NBC is thus far obligated to pay $1,250,000.[5/]

On March 27, 1989, NBC filed a proof of claim against the bankruptcy estate in the amount of $1,598,696 for

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[5/] NBC's right to show Manhunter a second time has apparently lapsed, setting the amount owed to DEG permanently at $1.25 million).

advertising time furnished for DEG's benefit. In that claim, NBC asserted a right to a $2,000,000 offset relating to the debt it owed to DEG regarding the Manhunter agreement.

On October 4, 1990, the Bankruptcy Court entered an Order denying CTI's motion for summary judgment.[6/] On October 11, 1990, CTI filed a notice of appeal of that Order.

Jurisdiction

Appeals of final orders of the Bankruptcy Court are taken as a matter of right to this Court pursuant to 28 U.S.C. §158(a).

6/ Moveover, the Bankruptcy Court actually granted summary judgment in favor of NBC as to the seventh claim for relief (i.e. setoff). See Order dated October 3, 1990, Appendix at p. 288-289.

Standard of Review

This Court reviews the Bankruptcy Court's findings of fact by the clearly erroneous standard of Fed.R.Civ.P. 52(a). In Re American Mariner Industries, Inc., 734 F.2d 426, 429 (9th Cir. 1984). But the Bankruptcy Court's conclusions of law are subject to de novo review. Id.

Discussion

1. The Quantum Meruit Issue

The Bankruptcy Court appears to have erred in its handling of this issue. Specifically, a key conclusion of law is not supported by the case law upon which the court relied. Nonetheless, as will be explained below, the Court need not disturb the result reached by the Bankruptcy Court.

Conclusion of Law 6., Appendix p. 288, states: "Recovery may be had on a

quantum meruit claim even if the party against whom relief is sought was not the party who requested the labor, materials or service, the value of which is sought to be recovered. Earhart v. William Low Company [25 Cal.3d 1344, 158 Cal.Rptr. 887 (1979)]." However, to the contrary, Earhart involved a quantum meruit recovery against a defendant who was himself the requestor of the services.[7/]

7/ In Earhart, the California Supreme Court described the issue before it as follows:

> "In this case we must determine whether a party who expends funds and performs services at the request of another, under the reasonable belief that the requesting party will compensate him for such services, may recover in quantum meruit although the expenditures and services do not directly benefit property owned by the

(continued...)

Moreover, the careful and extensive reasoning of Earhart had nothing to do with recovery against anyone other than the party who induced the plaintiff to perform. Notably, the Court in Earhart ended its analysis by stating: "we conclude that compensation for a party's performance should be paid by the person whose request induced that performance." Id., 158 Cal.Rptr. at 894-895. Therefore, the Court finds that Conclusion of Law 6. is in error.

However, Conclusion of Law 7. brings the instant case back within the ambit of Earhart, albeit by a different route. Conclusion of Law 7. states that: "DEG benefited from the Network Time

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2/(...continued)
requesting party."

Earhart, 158 Cal.Rptr. at 888.

rendered to it by NBC at DEG's special instance and request." Put more simply, the Bankruptcy Court found that DEG was the requestor of the advertising time from NBC. Earhart's principle that the party who induced the performance should be the one to pay would then readily apply.

A source of some confusion is that Conclusion of Law 7. is seemingly more akin to finding of fact rather than a conclusion of law. But this problem of nomenclature is not critical. Finding of Fact 1. states that: "Any Conclusion of Law, infra, more properly denominated a Finding of Uncontroverted Fact is incorporated herein." Hence, the Court views Conclusion of Law 7. as a finding of fact. Notably, treatment of Conclusion of Law 7. as a finding of fact

changes the standard of review to clearly erroneous, rather than de novo.

However, the standard of review chosen is not determinative. In the Pre-trial Order, the parties stipulated that DEG's status as requestor of the advertising from NBC was uncontroverted. Undisputed Fact 8., Appendix p. 351, states: "At the request of DEG and with DEG's prior approval, BBDO, as agent, purchased certain network advertising time (the "Network Time") from NBC." Hence, the parties stipulated that it was DEG that requested its agent to obtain services from NBC. Accordingly, the Bankruptcy Court did not have to make a finding on this point. As such, even if Conclusion of Law 7. is viewed as a finding of fact, it is merely a finding

of uncontroverted fact and is certainly not clearly erroneous.

Put simply, since the parties stipulated to treatment of DEG as the party who induced NBC to perform, the Bankruptcy Court did not err in relying upon Earhart v. William Low Company for the proposition that quantum meruit relief is appropriate in this case.

CTI puts forth one other argument in support of its appeal of the quantum meruit issue: the Bankruptcy Court erred as a matter of law because California quantum meruit law requires that a court must find that the service provider (NBC) expected to be paid by the party inducing it to act (DEG). Moreover, CTI contends that no such finding could have been made because, in its view, NBC only had

expectation of payment from BBDO, and not from DEG.

NBC argues in response that quantum meruit relief does not require that the party induced to act expected to be paid by the party that induced the action, but only that the party induced to act expected to be paid by someone. NBC argues that the cases cited by CTI support only the more limited proposition that the party induced to perform expected payment from someone. E.g. Payne v. Bank of America, 128 Cal.App.2d 195, 275 P.2d 128 (1954); Bean v. Wilson, 120 Cal.App.2d 58, 260 P.2d 134 (1953); and Wescoatt v. Meeker, 63 Cal.App.2d 618 (1944).

The requirement that the party induced to act had an expectation of payment is designed to separate quantum

meruit and implied contract cases from situations where the service provider acted gratuitously, or "as one devoted friend might perform for another during a period of illness, distress or other travail without expectation of pecuniary reward." Payne v. Bank of America, 275 P.2d at 134. Hence, the rationale behind the expectation of payment requirement suggests that the expectation of payment need only be of a general nature.

Moreover, none of the cases cited by CTI expressly state that a mandatory element of quantum meruit recovery is that the service provider expect payment from the party requesting the service. At most, those cases support the broader proposition that some expectation of payment, from whatever source, is required. Accordingly, the Court rejects

CTI's argument that the Bankruptcy Court erred in not making a finding that NBC had expectation of payment from DEG. Further, there is no question that NBC was in the business of providing advertising time on its network for a fee; it clearly had an expectation of payment from someone. This is sufficient under California law.

For all of the foregoing reasons, the Court AFFIRMS the Bankruptcy Court's grant of NBC's motion for summary judgment as to its quantum meruit claim.

2. NBC's Setoff Claims

NBC concedes that the Bankruptcy Court's Order confirming the plan of reorganization is final and binding upon it. However, the parties disagree about the effect of that Plan on NBC's setoff rights. NBC argues that confirmation of

the Plan had no effect on its right to setoff. CTI argues that the confirmation unequivocally cut off NBC's previously asserted setoff rights or, alternatively, that NBC waived its right to setoff.

11 U.S.C. §553 recognizes the creditor's right to setoff.[8/] However, "its application, when properly invoked before a court, rests in the discretion of that court, which exercises such discretion under the general principles of equality." U.S. v. Norton, 717 F.2d

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[8/] §553 provides, in relevant part:

> "Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against the claim of such creditor against the debtor that arose before commencement of the case...".

767, 772 (3rd Cir. 1983), citing 4 Collier on Bankruptcy, para. 553.02, at 553-11 (15th Ed. 1983).

> A creditor's right to setoff is contrary to the Bankruptcy Code's dominant theme of equal treatment of creditors, because a setoff has the effect of paying one creditor more than another. Setoff rights are, therefore, strictly construed in bankruptcy proceedings." In re Charter Co., 103 B.R. 302 (M.D. Fla. 1989). Cf. Bohack Corp. v. Borden, Inc., 599 F.2d 1160 (2nd Cir. 1979) (Second Circuit favors setoff).

But the right to setoff is essentially very broad. The terms of §553 recognize only three limitations to the right of setoff: (1) the automatic stay provisions of §362[9]; (2) provisions

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[9] "Thus, before a setoff can be made against the debts owed by a petitioner in bankruptcy, a creditor must seek relief from the automatic stay." In re Charter Co., 717 F.2d at 771.

controlling the trustee's use, sale or lease of property of the estate under §363; and (3) disallowance of the creditor's underlying claim under §502(b)(3). If none of these limitations apply, §553 states that, "this title does not affect any right of a creditor to offset a mutual debt."

CTI urges the Court to rely on In re Charter for the proposition that NBC has waived its rights to setoff. The court in In re Charter held that because the creditor, Exxon, "did not seek Bankruptcy Court approval for its setoff prior to the date of [plan] confirmation, it waived any setoff privilege that is may have had." In re Charter, 302 B.R. at 305. However, the facts here are quite distinguishable, as NBC did seek

approval for its setoff well prior to the date of plan confirmation.

NBC first sought relief from the automatic stay for purposes of obtaining setoff in a motion for relief from stay filed on or about March 11, 1989.[10/] The Plan was not confirmed until May 3, 1990. Accordingly, the Court should find that NBC did not waive its right to setoff under §553.[11/]

[10/] By order of the Bankruptcy Court, this motion for relief from stay was subsequently converted into the adversary proceeding that is being appealed here.

[11/] CTI's citation to Lewis Industries v. Barham Construction, Inc., 878 F.2d 1230 (9th cir. 1989), is also distinguishable. The court in that case ruled that setoff was not allowable, i.e. was waived, because the party asserting setoff had done nothing to assert setoff until after a hearing regarding the creditor's claim. Here, NBC did assert the setoff prior to the confirmation hearing as it had made a motion for relief from the automatic stay over a year prior to the hearing.

However, the question remains whether confirmation of the plan, prior to the Bankruptcy Court's final approval of NBC's setoff claim, had the effect of voiding NBC's setoff rights. CTI claims that under 11 U.S.C. §1141, confirmation of the plan and reorganization had the effect of eliminating NBC's setoff rights. CTI essentially argues that NBC should have attended the confirmation hearing and argued in support of its setoff rights at that time. Initial examination of the status lends some credence to CTI's assertions.

11 U.S.C. §1141 (a) provides:

> "Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner

> in the debtor, whether nor not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder or general partner has accepted the plan."

Applied to the instant case, this section means that creditor NBC is bound by the provisions of the Plan confirmed by the Bankruptcy Court on May 3, 1990. With this notion, NBC does not dissent.

But more critical to this case is §1141(c) which provides:

> "After confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, of equity security holders, and of general partners in the debtor, except as otherwise provided in the plan or in the order confirming the plan."

If the confirmed plan of reorganization dealt with the property at issue here, i.e. amounts owed to DEG by NBC pursuant to the Manhunter agreement, and that Plan did not acknowledge NBC's alleged setoff right regarding that property, §1141(c) means that such property is free and clear of any creditor claims not outlined in the Plan, or in the order confirming the Plan. In other words, NBC's setoff claim would be ineffectual.

However, this analysis would appear to be at odds with the express terms of 11 U.S.C. §553 which recognizes a creditor's right to setoff, limited only by three provisions not applicable here. Unfortunately, no case appears to have directly addressed the relationship between the discharge effect of §1141 and a creditor's right to setoff recognized

in §553. Therefore, given the policy underlying the notion of a setoff right, and the equities of the case, the Court holds that the Bankruptcy Court did not err in denying CTI's motion for summary judgment.

As noted by the court in U.S. v. Norton, 717 F.2d 767, 773 (3rd Cir. 1983), "the historical antecedents of setoff rights are long and venerable and are based on the common sense notion that 'a man should not be compelled to pay one moment what he will be entitled to recover back the next.'" Congress acknowledged the concept of the setoff right by creating §553. Congress molded the setoff right to be consistent with the other goals of bankruptcy law by putting the aforementioned limitations on the application of that right (e.g.

automatic stay). But the Court has determined that none of the limitations in §553 have application here. Therefore, §553's basic purpose of not compelling one side to pay an amount that will immediately be recovered comes to the fore.

Further, the equities in this case favor recognizing NBC's setoff right. First, this is not a case which a creditor sat on its rights. NBC began affirmatively pursuing is claims against the bankruptcy estate, including setoff, as early as March 1989, while the plan of reorganization was not approved until May, 1990. Moreover, the actions of the Bankruptcy Court suggest that it would be inequitable to NBC to void its setoff claim.

Specifically, on January 10, 1990, at a regularly scheduled status conference regarding the adversary proceeding instituted by NBC, the Bankruptcy Court set May 31, 1990 as discovery cutoff and set July 17, 1990 as the date for the pre-trial conference. It is undisputed that at the status conference, the court stated that it would not set a trial date prior to the pre-trial conference date. Hence, the Bankruptcy Court scheduled the resolution of the NBC's adversary proceeding, which included a claim for setoff, for a date clearly beyond the date (May 3, 1990) on which it ultimately approved the plan of reorganization. These scheduling actions would likely suggest to a reasonable person that the claims at issue in the adversary proceeding were safe from

discharge by an interim confirmation of a plan.

Therefore, for the foregoing reasons, the Court must also AFFIRM the Bankruptcy Court's ruling which denied CTI's motion for summary judgment as to NBC's seventh claim for relief (i.e. setoff).

IT IS SO ORDERED.

Dated: March 5, 1991

/s/ JOHN G. DAVIES
John G. Davies
United States District Judge

APPENDIX C

LIST OF SUBSIDIARIES

NEW CAROLCO INVESTMENTS B.V.
Chabotlaan 165
3055 AE Rotterdam
The Netherlands

Corporation	Ownership
Subsidiary New Carolco Investments B.V.	
Carolco Pictures Inc.	Approx. 56.6%
Subsidiaries of Carolco Pictures Inc.	
Carolco International N.V.	100%
Carolco Service Inc.	100%
Carolco Television Inc.	35%
Complete Film Corporation Inc.	100%
Executive Air Leasing Inc.	100%
LIVE Entertainment Inc.	48%
Orbis Communications Inc.	100%
The Vista Organization, Ltd.	33%
Subsidiaries of Carolco International N.V.	
Carolco Films International Limited	100%
Carolco do Brasil Ltd.	100%
Anabasis B.V.	100%

Corporation	Ownership
Subsidiaries of Anabasis B.V.	
Anabasis Investments N.V.	100%
Subsidiaries of Carolco Service Inc.	
International Production Services Inc.	100%
Carolco Production Services Inc.	100%
AA Production Services Inc.	100%
Basic Inst Inc.	100%
Deadly Inc.	100%
Doors Project Inc.	100%
Final Warning Inc.	100%
L.A. Story Inc.	100%
SLT Productions Inc.	100%
T-2 Productions Inc.	100%
Universal Soldier Inc.	100%
Subsidiary of Carolco Television Inc.	
Carolco Studios Inc.	100%
Subsidiary of Orbis Communications Inc.	
Orbis Networks Inc.	100%